Deer Creek Mining Company *and* United Mine Workers of America. Cases 26–CA–13844, 26–CA–13977, and 26–CA–14186

September 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 30, 1991, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

In adopting the judge's finding that the Respondent's May 3, 1990 letter to employees did not constitute an unlawful threat to reduce wages, we rely on *Benjamin Coal Co.*, 294 NLRB 572 (1989). In that case the Board noted that the employer's letter to employees predicting dire economic consequences from unionization relied on evidence that the union would insist on the terms of the standard agreement of the Bituminous Coal Operators Association. In addition, in *Benjamin Coal*, the employer had advised employees of its deteriorating economic position and its inability to absorb additional cost. The Board found that the employer's letter was lawful, noting that the employer had communicated to employees the objective facts underlying its pronouncement.

Similarly, the Respondent here, in making its statement that it would be required to reduce wages to minimal levels to pay for the union benefit plans, relied on ''existing union demands,'' an apparent reference to the standard union contract. Further, in sections of the letter not quoted by the judge, the Respondent explained that under its contract to sell coal to the power company, any cost increases would have to be approved by the power company. If the increases were not approved, the Respondent's contract would be terminated. The Respondent further explained that other coal companies in the region were ''servicing similar contracts'' at a ''price that is equal to or less than'' its price and, because competition was so stiff, the power company would not likely approve increases, and ''other coal companies would quickly grab up our contract at the first opportunity.'' In these circumstances, we find that the Respondent's statement about reducing wages was based on objective facts and conveyed its belief as to demonstrable consequences beyond its control, i.e., that the costs of existing union benefits plans were so high that the Respondent could not afford to pay them without reducing existing wages. Accordingly, we agree with the judge that the Respondent's statement was lawful.[4]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent did not unlawfully fail to recall Michael Wilson, we find that, even assuming that the Respondent had knowledge of union activity by Wilson, a dismissal is proper because the Respondent sustained its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Specifically, we find that the Respondent has shown that Wilson would not have been recalled even in the absence of his union activity because the Respondent suspected him of theft and discovered that he had a criminal record and because the Respondent's owner, Lewis Vandiver, abhorred Wilson's vulgar language.

We correct the judge's inadvertent reference to the UAW in the final paragraph of sec. III,B,1 of his decision. It is clear from the context that the judge intended to refer to the Charging Party, the UMWA.

We also correct the judge's finding in sec. III,C of his decision where he states ''as alleged, that Paul Tim Winebarger was refused recall by Respondent from August 23, 1990, forward in violation of Section 8(a)(3) and (1) of the Act.'' As the judge earlier noted in par. 2 of his decision, the General Counsel amended the complaint at the hearing to allege that the Respondent violated Sec. 8(a)(3) and (1) by refusing to recall Paul T. Winebarger from layoff on November 16. Accordingly, we find that the violation runs from November 16, 1990, forward.

[3] We shall correct the recommended Order's reinstatement language and require that notification be made to the Regional Director 20 days from the date of the Order rather than 20 days from receipt of the Order. In addition, we shall include an expunction remedy.

[4] Member Oviatt concurs in the dismissal of the allegation that the Respondent unlawfully refused to recall Michael Wilson. He concludes, however, that the judge erred in failing to find a prima facie case, more specifically, by failing to impute Supervisor Tommy Adamson's uncontroverted knowledge that Wilson would sign a union card to the Respondent. When the Respondent hired Donnie Clenending in Wilson's former job following his layoff, Supervisor Adamson, an acknowledged ''company man'' with clear knowledge of Wilson's prounion sentiments, was mine superintendent. In the absence of specific evidence to the contrary, a supervisor's knowledge of prounion sentiment is imputed to the respondent employer. *Pinkerton's Inc.*, 295 NLRB 538 (1989). Cf. *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983). The Respondent did not make that proof.

Consequently, the classic elements of a prima facie unlawful refusal to recall Wilson are present. Wilson expressed prounion sentiment. The Respondent knew it. Supervisors Larry Campbell and Adamson each threatened Wilson that if the employees voted in the Union, Owner Vandiver would shut the mine down. The Respondent unlawfully interrogated and threatened other employees and unlawfully refused to recall other union adherents.

The Respondent's burden thus was to prove that Wilson would not have been recalled even in the absence of his union activity. The Respondent points to Wilson's criminal record and vulgar language.

Continued

ORDER

The National Labor Relations Board orders that the Respondent, Deer Creek Mining Company, Webster County, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities and sentiments.

(b) Creating the impression that employees' union activities are under surveillance.

(c) Threatening to close the mine if employees obtain union representation.

(d) Refusing to recall employees from layoff because they engage in union or other protected activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Paul Tim Winebarger and John Massey immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful refusals to recall Paul Tim Winebarger and John Massey and notify them in writing that this has been done and that the unlawful refusal to recall will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Webster County, Kentucky, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your union activities or sentiments.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT threaten to close the mine if employees obtain union representation.

WE WILL NOT refuse to recall employees from layoff because they engage in union or other protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Paul Tim Winebarger and John Massey immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to sub-

This is a close call. The Respondent failed to establish a policy of conducting criminal background investigations before hiring or recalling employees. Therefore, it is not free from doubt that the Respondent did not direct its attorney, Richard Wayne Adams, to conduct a criminal background check on Wilson because of his known prounion sentiment. Nevertheless, I agree with my colleagues that the Respondent satisfied its burden under *Wright Line*, supra. Respondent's owner Vandiver legitimately suspected, although he admittedly had no proof, that Wilson might have been responsible for theft at the mines. Accordingly, Vandiver had a legitimate basis to direct Adams to check on Wilson, which Adams did around June 1, prior to the July 18 informal settlement of the original and less specific May 7 8(a)(3) charge, and the September 5 complaint alleging, inter alia, the threats of plant closure and the refusal to recall Wilson since July 20. Adams unearthed an ''extensive criminal record'' which was explored on cross-examination of Wilson. Further, Vandiver testified that Wilson had a ''nasty mind and attitude,'' that Wilson repeatedly cursed and used ''vulgar, vulgar words'' that were offensive, and that Vandiver decided not to recall Wilson after he reviewed his criminal record. I find that these reasons are legitimate and that the Respondent has rebutted the General Counsel's prima facie case.

stantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL remove from our files any reference to the refusals to recall Paul Tim Winebarger and John Massey and notify them in writing that this has been done and that the refusals to recall them will not be used against them in any way.

DEER CREEK MINING COMPANY

William Levy, Esq., for the General Counsel.
Grover Potts Jr., Esq. (Wyatt, Tarrant & Combs), of Louisville, Kentucky, for the Respondent.
Steve Earle, International Representative, of Madisonville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. Upon an original charge filed in Case 26–CA–13844 on May 7, 1990,[1] and an amended charge filed in that case on July 16, the Regional Director for Region 26 of the National Labor Relations Board and Deer Creek Mining Company (Respondent), entered an informal settlement agreement on July 18 to remedy alleged violations of Section 8(a)(1) of the National Labor Relations Act (the Act). On August 3, the abovenamed Union filed a charge in Case 26–CA–13977. Thereafter, on September 5, the Regional Director issued a complaint which consolidated Cases 26–CA–13844 and 26–CA–13977 for trial; alleged that Respondent had violated Section 8(a)(1) of the Act by engaging in specified conduct; alleged that Respondent had violated Section 8(a)(3) and (1) of the Act by refusing to recall Michael Wilson from layoff since July 20 and by announcing on July 20 that it would not recall employees Paul (Tim) Winebarger, John Massey, and Donald Raynor from layoff; and revoked the informal settlement agreement entered on July 18. Respondent denied it had committed the violations alleged. On November 26, the Union filed the charge in Case 26–CA–14186. On December 14, an amended consolidated complaint was issued. It consolidated the captioned cases for trial, realleged the matter set forth in the September 5 complaint, and alleged that Respondent violated Section 8(a)(3) and (1) of the Act by refusing since July 20 to recall employee Tim Winebarger from layoff. Respondent filed a timely answer denying it had engaged in the unfair labor practices alleged.

The case was heard in Madisonville, Kentucky, on February 5, 6, and 7, 1991. During the hearing, General Counsel amended paragraph 11 of the complaint to allege that Respondent violated Section 8(a)(3) and (1) by refusing to recall Paul T. Winebarger from layoff on November 16, and by refusing to recall John Massey from layoff on December 10. Respondent denied that amendment to the complaint.[2]

Upon the entire record, including careful consideration of posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Nortonville, Kentucky, as well as a mining operation in Webster County, Kentucky, is engaged in the mining and sale of coal. During the 12-month period ending July 31, 1990, it, in the course and conduct of its business operations sold and shipped coal valued in excess of $50,000 from its Kentucky operations to points located outside the State of Kentucky. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a coal mine and a preparation plant in Webster County, Kentucky. It normally employs 50 to 65 employees. The coal seam mined—Seam 9—is about 50 inches high and coal is extracted by a continuous mining machine. The miner loads shuttle cars which transport the coal to a belt system which removes it from the mine. At all times material, all coal extracted was washed at Respondent's preparation plant.

During calendar year 1989, Respondent, pursuant to contractual arrangements with a coal broker, Driftwood Coal Company, was obligated to produce 30,000 tons of coal per month for American Electric Power Company. Gregory Bruce, Respondent's accountant, credibly testified that Respondent was unable to produce the requisite 30,000 tons during 5 months in 1989, and that it lost $136,816 during the last 6 months of its fiscal year which ended in January 1990.[3] In January 1990, Driftwood and/or American Power exercised a contractual option which obligated Respondent to produce 40,000 tons of coal per month for American Power. Bruce testified he discussed the production and economic situation with Lewis Vandiver, who owned 50 percent of the Company and was active in the daily management of the operation. Vandiver decided to eliminate the second-shift operation, extend working time for the first shift employees from 8 hours to 10 hours, and effectuate a layoff to reduce labor costs.

In late March or early April, the Union commenced an organization campaign at Respondent. The first meeting attended by Respondent employees was held at the Union's hall in Madisonville, Kentucky, on April 9. Thereafter, additional meetings were held with Respondent employees on

[1] All dates herein are 1990 unless otherwise indicated.

[2] By motion dated April 8, 1991, General Counsel requested that I take official notice of Mine Safety and Health Administration form 2000–122 received by the Union from MSHA subsequent to the close of hearing. Having duly considered the motion, it is denied.

[3] See R. Exh. 4.

April 23 and 30, and on numerous dates after April 30. By letter dated April 24, Brad Burton, the Union's Midwest Regional Director, advised Respondent of its organizing campaign. The body of the letter states (G.C. Exh.):

> This letter informs you that the United Mine Workers of America are conducting a union organization drive at Deer Creek Mining Company. The United Mine Workers intend to conduct an honest and lawful campaign and will insist that Deere [sic] Creek Mining Company does the same.

The complaint alleges, and General Counsel contends, that during the Union's organization campaign, Respondent, through the conduct of various Respondent supervisory personnel, violated Section 8(a)(1) of the Act. Additionally, while conceding that a layoff effectuated on April 30 to permit elimination of second-shift operations and institution of a 10-hour workday for first-shift employees was lawful, the complaint, in amended form, alleges that Respondent violated Section 8(a)(3) on various dates on and after July 20, by failing to recall the following employees from layoff: Paul (Tim) Winebarger; Michael Wilson; John Massey; and Donald Raynor. The issues posed are discussed individually below.

B. *The Alleged 8(a)(1) Conduct*

1. By Lewis Vandiver

Paragraphs 7(a) and (b) of the complaint allege that during a telephone conversation on April 28, Lewis Vandiver unlawfully interrogated an employee and unlawfully gave the employee the impression that employees' union activities were under surveillance.

General Counsel sought to prove the allegations through the testimony of employee Carlos Lamb. Lamb testified that on April 28 Lewis Vandiver telephoned him at his home at approximately 6 p.m. He described the ensuing conversation as follows (Tr. 60, 61):

> Well, the phone rang and I answered it, and Lewis said, ''Hello,'' and I put my hand over the receiver and told a friend that it was Lewis, and I said, ''What did you say?'' and he said, ''How're you doing,'' and I said, ''Fine.'' He said, ''Whatcha' doing,'' I told him I'd just had supper. He said, ''Well, I did, too, I had fish myself.'' He said, ''What can you tell me about the meeting?'' and I said, ''What meeting?'' and he said, ''You don't know anything about the meeting'' and I said, ''Yes, sir, I know about the meeting.'' And he said then, ''Are you for it?'' and I said, ''Well, yes, sir, I'm leaning that way,'' my exact words.
>
> Then he said—Then he got angry. He said, ''That makes me sick,'' said, ''you're going against a brother and following the world.'' I said, ''no, sir, I'm not.'' He said, ''Yes, you are,'' said, ''you're following Tim Winebarger.'' I said, ''No, sir, I'm not following Tim Winebarger.'' He then said that would gag a maggot.
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> And he said, ''You're wanting more money than what you agreed to work for,'' and I said, ''no, sir, I'm working for less money than what I agreed to work for,'' and he said, ''Well, I'll see that you'll not get another penny more,'' and I said, ''Well, sir, whatever you think,'' and we ended the conversation with that.

Lewis Vandiver admitted he telephoned employee Lamb at his home on April 28. While Vandiver made no attempt to describe the conversation in detail, he claimed he called Lamb because Lamb had been ''dirty mouthing'' him in the mine that day during a meeting with employees. He denied that he interrogated Lamb about his union activities during the conversation and claimed that the meeting he inquired about was Lamb's meeting in the mine with others. At one point, when asked what he said to Lamb, Vandiver stated, ''probably what he said I said I did.'' Lamb acknowledged that Vandiver spoke to him about saying nasty things about him in the mine. He indicated, however, that when he related to other employees on Monday, April 30, what Vandiver had said during their April 28 phone conversation, Superintendent Black overheard his remarks and Vandiver confronted him about what he had told employees when he left the mine at the end of the shift. I accept Lamb's testimony completely. He was not employed by Respondent at the time of the hearing and he had no reason to relate anything other than his honest recollection of events. Without hesitation, I credit Lamb's straightforward account of the phone conversation, rather than the rambling account given by Vandiver. Accordingly, I find, as alleged, that on April 28, 1990, Respondent, through Lewis Vandiver, interrogated an employee concerning his union activities, and gave the employee the impression that the employees' union activities were under surveillance by Respondent. By engaging in such conduct, Respondent violated Section 8(a)(1) of the Act.

Paragraphs 7(c) and (d) of the complaint allege that on April 28, 1990, Lewis Vandiver unlawfully interrogated an employee at the facility and threatened an employee with futility of bargaining should the employees select the Union to represent them.

General Counsel sought to prove the allegations through the testimony of employee John Massey. Massey, a belt man, testified that at approximately 5 minutes of 3 p.m. on Saturday, April 28, he went to the shower room at Respondent's facility and started to take off his clothes so he could shower. When he was about ready to get in the shower, he claims Lewis Vandiver came in and the following conversation ensued (Tr. 134, 135):

> At that time when he first come in and asked me, I was taking off my clothes, getting ready to get in the shower house, getting ready to get in the shower, and he said, ''What are you . . .'' and he said, ''John Boy, what do you think about the union'' and he always called me ''Preacher,'' but that day, he said, ''John Boy. He said, ''What do you think about the union?'' I said, ''What do you mean about the union?'' and he said, ''Oh, what about signing it,'' and I said, ''If the rest of them do, I will,'' and I went on and got the shower turned on, and had started taking a shower, and he come on to the shower, and then asked me about it, and he said—he started talking about it and he beat on it, and I said, ''Well, if the rest of them do, I will.'' That's when I was in the shower house when I said, ''If the rest of them do, I will,'' and he said, ''It won't

go, I guarantee you it won't go,'' and started beating the wall, and said, ''It won't go.''

Vandiver acknowledged conversing with Massey in the bathhouse on April 28, but his version of the incident is entirely different from the one given by the employee. He claims he heard someone in the bathhouse at 12 minutes to 3 p.m. and when he investigated he saw Massey was in the shower. He claims he asked Massey if he had inspected the slope belt, and that the employee told him he had, and it was fine. He denied he asked the employee anything about the Union; he denied he predicted that bargaining would be an exercise in futility; and he denied that he beat on the shower while Massey was in it.

In support of Vandiver's version of what occurred, Respondent presented employee Walter Hart, who is the second shift belt man. Hart credibly testified that when he started work at 4 p.m. on April 28, he noticed a bad splice in the belt which would have caused it to break very soon if coal was run on it. Hart testified Massey would have seen the defective splice if he had inspected the slope belt as he was supposed to at the end of his shift on April 28.[4] Significantly, he indicated Vandiver told him Massey had left early that day. Finally, Vandiver testified that after Massey was laid off on Monday, April 30, Vandiver directed his attention to a waste barrel which contained the splice which had been removed from the belt by Hart the preceding Saturday. Vandiver claims, and Massey denies, that when showing him the bad splice, Vandiver made a comment about Massey telling him a tale about inspecting the belt on Saturday.

Hart was no longer employed by Respondent when he appeared to testify. I found him to be an entirely credible witness. His testimony causes me to conclude that both Massey and Vandiver recalled only those portions of the bathhouse conversation which advanced their respective causes. Thus, I conclude that Massey quit early that day, as claimed by Vandiver, and I conclude Vandiver asked him if he had checked the belt and he stated he had, and that he replied it was fine. Similarly, I credit Massey's version of the interrogation and his description of Vandiver's conduct during the incident. While Massey admitted Vandiver showed him a defective splice on Monday, April 30, he denied Vandiver told him he would have fired him if he had not been included in the layoff. I credit his denial.

As noted above, General Counsel contends that Massey's version of the bathhouse incident constitutes proof of the unlawful interrogation, and proof of the allegation that Respondent informed an employee that selection of the Union as the employee's representative would be an exercise in futility. I find that Respondent, through Vandiver's April 28 conduct, interrogated employee Massey about his union sentiments, and it thereby violated Section 8(a)(1) of the Act. Apparently, General Counsel relies on Vandiver's ''It won't go'' comment to establish the ''exercise in futility'' allegation. I find the comment to be ambiguous and conclude General Counsel has failed to prove the allegation set forth in paragraph 7(d) of the complaint. Accordingly, I recommend that the allegation be dismissed.

[4] If Massey had observed a bad splice, it is uncontroverted that he would have been obligated to stay and fix it to avoid downtime by the second shift which started to work at 4 p.m.

Paragraph 7(e) of the complaint alleges that in letters mailed to employees on May 3, Respondent threatened employees with loss of wages and benefits if they selected the Union to represent them.

The paragraph of Lewis Vandiver's May 3 letter to employees which is relied on by General Counsel to prove the above-described allegation is as follows:

> If you have signed a card that does not mean you will be represented by the Union. By signing a card this may result in a vote being conducted at out [sic] mines. If the vote fails to pass by majority, there will be no UMWA representation. If the vote does pass by majority, this only means the UMWA would be allowed to negotiate, a contract, if they could on your behalf. During the negotiation period those who wish to work can. Other employees willing to work can be brought in. There are no guarantees even if the vote were to pass that a Union contract would ultimately be reached. Considering our contract, to satisfy existing union demands I would be required to cut wages to the $4.00 hour range just to pay for the Retirement funds, the medical plans, the union dues, and other assessments that would go along with it.

General Counsel contends that by telling employees that ''[T]o satisfy existing union demands I would be required to cut wages to the $4.00 hour range just to pay for the Retirement funds, the medical plans, the union dues, and other assessments that go along with it,'' Respondent made a prediction about the effect of unionization which violates Section 8(a)(1) of the Act. I find the contention to be without merit.

Although General Counsel apparently views the quoted statements from the May 3 letter as a threat to reduce employees' wages from $13 per hour to $4 per hour if they obtain union representation, I view the statements as a simple indication by Respondent that, in the give and take of negotiations, a portion of the employees' wages may be traded for benefits normally contained in UAW contracts. I find the statements to be protected by Section 8(c) of the Act. See *Histacount Corp.*, 278 NLRB 681, 689 (1986).[5]

2. By Larry Campbell

Paragraph 8 of the complaint alleges that Larry Campbell threatened employees with plant closure if they selected the Union to represent them on April 25, 1990. General Counsel sought to prove the allegation through testimony given by employee Michael Wilson.

Wilson testified that 3 to 4 weeks before the April 30 layoff, he asked Foreman Campbell about the Union, and ''he just came out and told me that Lewis would shut it down if it goes union, that he wouldn't run it.''

When Campbell appeared as a witness, he admitted he had a union related discussion with Wilson outside the bathhouse. He recalled that he told Wilson ''it would probably go union

[5] General Counsel contends in his brief (p. 17) that Respondent's threat in May 3 letter to bring in ''other employees'' during the ''negotiation period'' constitutes an unlawful threat of loss of jobs and available work. No such violation was alleged in the complaint. Accordingly, I refrain from making any finding regarding the contention.

if it was voted on, but I said Lewis will probably not give you a contract and he'll shut the mines down.'' Campbell claimed he was voicing his personal opinion and that he told Wilson as much. During cross-examination, Campbell added that he told Wilson Lewis would probably never give them a contract on account of they couldn't afford it because they wasn't running no production.

Campbell is admittedly a statutory supervisor and an agent of Respondent. Although Respondent contends his remarks to Wilson were protected by virtue of Section 8(c), I conclude that by telling the employee if employees voted in the Union, Vandiver would probably not give them a contract, but would close the place down, Campbell engaged in conduct which could be expected to restrain Wilson from engaging in union activity. I find, as alleged, that Respondent, through Campbell's described conduct, violated Section 8(a)(1) of the Act.

3. By Tommy Adamson

Paragraph 9 of the complaint alleges that on or about April 27, Tommy Adamson threatened employees with plant closure if they selected the Union to represent them.

General Counsel sought to prove the allegation through the testimony of employees Wilson and Winebarger and through testimony given by Adamson. Winebarger testified that about a week before the April 30 layoff, while he and Adamson were sitting in a crosscut, he asked Adamson what he thought might happen if it went union. While he indicated he could not recall Adamson's precise answer, he claims Adamson said the mine would be shut down if it went union.

Wilson testified that he had a union-related discussion with Adamson inside the mine a couple of weeks before the April 30 layoff. He claims he asked Adamson if he would sign a union card and that the supervisor said ''of course he would, but it wouldn't do him any good because he was a company man.'' The employee testified Adamson then asked if he would sign a card, and he replied by saying yes, he would.

When Adamson, who was no longer employed by Respondent at the time of the hearing, was called as a witness by General Counsel, he testified that 3 to 4 days before the April 30 layoff Wilson asked him what he thought would happen if they got a union vote and that he replied ''He'll probably close the mine down.'' Adamson was not asked whether he made a similar statement to any other employee (Winebarger). Adamson was recalled by Respondent as its witness when it presented its defense. He then testified that he did not recall any conversation with Winebarger about the Union about a week before the layoff. He expanded on the conversation he had with Wilson by claiming he told Wilson that if it came to a union vote, that Vandiver would shut the mines down because he wouldn't be able to afford to operate the mines and pay the union dues or royalties or whatever.

Adamson was admittedly a statutory supervisor and an agent of Respondent at times material herein. While he testified he could not recall telling Winebarger the mine would be shut down if it went union, it is clear he was of the opinion that Vandiver would take such action if Respondent's employees obtained union representation. I credit Winebarger's testimony regarding the crosscut conversation. Consequently, I find, as alleged, that on or about April 27, 1990, Respondent violated Section 8(a)(1) of the Act by threatening plant closure if employees obtained union representation.

Regarding the plant closure threat voiced to Wilson, I conclude the testimony given by Adamson when he first testified to be more reliable than the expanded version which he gave when called by Respondent. While I do not doubt that the reason he predicted mine closure if employees obtained union representation was his feeling that Respondent could not afford to operate under union conditions, I am not convinced he voiced the reasons when conversing with either Winebarger or Wilson. I find that by predicting mine closure during his conversation with Wilson on or about April 27, 1990, Adamson engaged in conduct which violates Section 8(a)(1).

4. By Don Black

Paragraph 10 of the complaint alleges that Don Black, an admitted statutory supervisor and agent of Respondent, threatened an employee with plant closure if employees selected a union to represent them on or about April 27, 1990.

Don Black, Respondent's mine superintendent until about May 15, 1990, was deceased at the time of the hearing. Employee Steve Renolds testified that, between April 23 and 30, while he and Black were in the mine, they discussed the Union and ''Don said that if the union stepped in, Lewis would shut the mines down.'' I find that Respondent, through Black's described conduct, violated Section 8(a)(1) of the Act.

C. *The Alleged 8(a)(3) Violations*

The complaint, in amended form, alleges that by announcing on July 20, 1990, that it did not intend to recall employees Paul Tim Winebarger, John Massey, Michael Wilson, and Donald Raynor from layoff, Respondent violated Section 8(a)(1) and (3) of the Act. In the alternative, it alleges that, on stated dates, Respondent violated Section 8(a)(1) and (3) by placing newly hired employees in the alleged discriminatees' prelayoff positions rather than recalling the alleged discriminatees to fill such openings.

Counsel recognizes in their briefs that their evidentiary burden in a refusal to recall employees from a layoff situation is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), where the Board stated (at 1089):

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The testimony and evidence offered by the parties in support of their positions regarding each of the four alleged discriminatees is outlined below.

Paul Tim Winebarger

Winebarger was employed at Peabody Coal Company's Camp 11 from January 1979 until he was laid off in October 1987. While at Peabody, he amassed 5 to 6 years' experience as a continuous miner operator. He was hired by Respondent

as a continuous miner operator in November 1987, and he testified without contradiction that Respondent's supervision was aware of the fact that he was in layoff status at the time, and that he could be recalled by Peabody if they reactivated the Camp 11 mine. At the end of 1988, Respondent effectuated a layoff. Winebarger was not laid off; he was retained as a general inside employee. Six or eight months later, he was again placed on the continuous miner.

Winebarger testified he received no written or oral reprimands while employed by Respondent. Like other miner operators, he indicated he was cautioned from time to time to keep his machine out of the bottom as the bottom contained fire clay which was hard to separate from the coal during the washing process. Apart from fire clay admonitions, he testified that he incurred the displeasure of management 4 to 6 months prior to the layoff when he shut the second shift down on one occasion because he refused to operate the miner when the methane monitor on his machine malfunctioned and he detected methane gas at the face. While supervision indicated they desired to remove him from the miner at the time, he continued to operate the machine on the second shift because no one else was capable of performing the work.

Uncontradicted evidence reveals that Winebarger attended union meetings held on April 9, 23, and 30. He signed an authorization card at the April 9 meeting and alerted other employees that a second meeting was to be held on April 23.

Lewis Vandiver testified that he was not aware of the fact that Winebarger and the other alleged discriminatees were union supporters until General Counsel marked the sign-in sheets signed by employees attending the April 9 and 23 union meetings as (G.C. Exhs. 7, 9), during the hearing. Vandiver's claim is belied by the testimony of employee Lamb (and by that given by Massey). Thus Lamb credibly testified that during his April 28 phone conversation with Vandiver, when he indicated he was leaning toward union representation, Vandiver accused him of ''going against a brother and following the world. . . . following Tim Winebarger.'' It is clear, and I find, that Respondent was aware of Winebarger's union sentiments on April 28.

On April 30, Winebarger attended a union meeting at the Ramada Inn in Madisonville before he went to the mine. He learned during the meeting that Respondent had laid off third-shift men, and Union Representative Steve Earle provided him with a tape recorder which he was to take to the mine when he reported for the second shift.

As indicated, above, Respondent experienced production difficulties and lost considerable money during the 6-month period preceding April 30, 1990. The record further reveals that the Union notified Respondent it was conducting an organization campaign among Respondent's employees by letter dated April 24. Vandiver testified the Union's letter caused him to retain Attorney Richard Adams to effectuate a layoff for Respondent on April 30. When employee Winebarger reported at the mine for the second shift on April 30, Adams spoke to the employees. Winebarger recorded his comments and a transcription of the tape was placed in the record as Joint Exhibit 1. During the meeting, Adams read off the names of the employees who were being laid off.[6] Winebarger's name was called. The transcription reveals that Adams told the employees, inter alia:

> Now those people that have been temporarily laid off will be able to collect your bonuses, and your vacation pay at the next period, whenever you are entitled to get paid. You will be entitled to two hours today for coming down here. Those individuals will be subject to recall after the shifts have changed around and the determination is made as to what individuals will be needed.

The original charge was filed in Case 26–CA–13844 on May 7, 1990. It alleged, inter alia, that on April 30, 1990, Respondent laid off nine employees for union activity. During the investigation of the above-described charge, Lewis Vandiver indicated in an affidavit dated August 23 that Respondent had recalled Glen Vaughn and had recalled or offered recall to Denver Renolds, Thomas Smith, and Terry Campbell and that it had no intention of recalling the other six employees laid off on April 30.

General Counsel placed in evidence as (G.C. Exh. 6), a list which indicated that Respondent hired 30 new employees and/or supervisors during the period extending from June 11, 1990, through the end of calendar year 1990. Mine Superintendent Hibbs testified that one Michael Fuson was hired to help out as a continuous miner on October 30. Employee Donald Black was later hired as a continuous miner operator on November 21, after employee Carrol Elkins had been hired on November 15 and had unsuccessfully been assigned to operate a miner.

Summarized, the record evidence which I credit reveals: (1) That Winebarger was known by Vandiver to be a union adherent as early as April 28, 1990; (2) that Respondent possesses marked antiunion animus as indicated by its interrogation of employees concerning their union sentiments, its creation of the impression that the union activities of its employees are under surveillance and its threats to close the mine if employees obtain union representation; (3) that Vandiver indicated he considered Winebarger to be one of the leaders of the union drive on April 28; (4) that the April 30 layoff was labeled temporary and employees were informed they would be recalled when needed; (5) that Respondent announced on August 23 that Winebarger was no longer considered eligible for recall; (6) that Respondent needed a second continuous miner operator from October 30 forward; and (7) that the record fails to reveal Winebarger was reprimanded or disciplined while employed by Respondent. I find the facts set forth warrant an inference that Winebarger's participation in protected activities was a ''motivating factor'' in Respondent's decision to refuse him recall from layoff.

Respondent sought to justify its decision to refuse Winebarger recall through testimony given by Lewis Vandiver and its Mine Superintendent James Hibbs, who was hired by Respondent on September 6, 1990.

Vandiver testified that Respondent failed to recall Winebarger because of his attitude, and because he was ''slow walking.'' Regarding attitude, he claimed he never saw Tim ''[W]hen he acted like he was happy or didn't have

[6] Ten employees were laid off on April 30. In addition to Winebarger, Wilson, Massey, and Raynor, the list included: Denver Renolds; Terry Campbell; Thomas Smith; Glen Vaughn; Lewis Vandiver Jr.; and G. D. Franklin, formerly a part owner of Respondent.

a problem about something.'' Regarding ''slow walking,'' he stated he had reports from the foreman that Winebarger wasn't loading coal. Vandiver admitted Winebarger was not informed in writing that he was not doing his job or not loading coal. He indicated he had orally spoken to ''all of them'' on both shifts about not running coal, but failed to identify any specific occasion on which he had spoken to Winebarger.

Hibbs testified that he became the superintendent at the mine about a week after he was hired. He indicated that Respondent decided shortly thereafter to reinstitute a second shift, and that he and Attorney Adams interviewed a number of employees for possible openings, including Winebarger. Winebarger recalled that the interview, which was conducted in Adams' office, occurred on September 20. He acknowledged that during the interview, he informed Hibbs he was in layoff status at Peabody and hoped to be recalled, but that he would accept work at Respondent in any job classification. Hibbs testified that subsequent to the interview, he recommended to Vandiver that Winebarger not be recalled because it appeared he would be recalled by Peabody soon, and because Winebarger's attitude was not positive enough to suit him; that the employee didn't impress him as a go-getter who would help improve production.

I conclude the reasons given by Vandiver and Hibbs for their decision to refuse recall to Winebarger are mere pretexts offered to hide the true reason for the decision to deny the employee recall. Although Vandiver accused the employee of failing to load coal, no evidence whatsoever was offered to show that the employee had been warned that his job was in jeopardy because he was not performing adequately. Similarly, although it is claimed he didn't have a proper attitude, no specific evidence was offered to show that Respondent had deemed the employee to possess a bad attitude prior to the time he participated in union activity. Regarding his recall status at Peabody, the record reveals he had enjoyed that status since October 1987, had been hired in spite of it by Respondent in 1987, and no evidence was offered to show that he was due to be recalled by Peabody at a time near September 1990. In sum, I find that Respondent has failed to show that it would have denied the employee recall in the absence of his participation in protected activities. Accordingly, I find, as alleged, that Paul Tim Winebarger was refused recall by Respondent from August 23, 1990, forward in violation of Section 8(a)(3) and (1) of the Act.

John Massey

Massey was hired by Respondent upon Lewis Vandiver's recommendation on January 5, 1987. During his period of employment, he performed the duties of a belt man. Those duties included walking the slope belt line to inspect it, and effectuating repairs and maintenance as required. While Respondent experienced a layoff in late 1988, Massey was retained on the day shift and continued to perform his prelayoff duties. The employee testified without contradiction that he was never disciplined and received no warnings regarding his performance during his tenure at Respondent.

As indicated, above, I credit Massey's claim that Vandiver interrogated him regarding his union sentiments in Respondent's bathhouse at approximately 3 p.m. on Friday, April 28. Additionally, I credit his claim that Vandiver became enraged when he learned the Employer favored unionization, and that Vandiver beat on the shower and shouted ''it won't go.''

Massey's uncontradicted testimony reveals that when he reported for work Monday morning, April 30, that Attorney Adams informed him he was being temporarily laid off; that in 30 days he would be called back if production picked up.

The record reveals that employee Walter Hart, who walked the slope belt on the second shift, left Respondent's employ to accept recall from layoff at Peabody Coal Company on June 10 or 11, 1990. Massey was not offered recall by Respondent at that time.

By establishing that Respondent learned that Massey intended to join the Union if other employees did on Saturday, April 28; that Vandiver became markedly disturbed when Massey admitted his prounion sentiments; that the employee was told he was being temporarily laid off April 20 and would possibly be recalled in 30 days if production picked up; and that Massey was refused recall when Hart resigned, thus creating a belt man vacancy on June 10 or 11, I find General Counsel adduced sufficient evidence to warrant an inference that Massey's participation in protected conduct was a motivating factor in Respondent's decision to refuse the employee recall from layoff on June 10 or 11, 1990.

Respondent defended its decision to deny Massey recall through testimony given by Vandiver and employee Hart.

Vandiver testified he decided that Massey would not be recalled to work at Respondent because he did not do the work. He claimed that he asked the employee on Saturday in the bathhouse whether he had checked the slope belt, and he asserted that Massey told him he had, and it was fine. Vandiver testified that, when the second shift started, second-shift belt man Hart told him there was a bad splice in the belt, and that Hart then spent about 1-1/2 hours repairing the belt. Vandiver indicated he decided at that time that Massey had not checked the belt, and that caused him to decide that he did not want the employee to work for him any more.

Hart, the employee who worked opposite Massey on the slope belt on the second shift, testified that Massey performed his share of the work when he was assigned to work with others, but he claimed that, when Massey worked alone, he did as little as possible. He indicated he had complained to management on a number of occas ions that Massey failed to perform work he should have performed on the first shift, and that created a heavier workload for him on the second shift. He indicated supervision failed to cause Massey to perform better, and, as a result, he eventually gave up and just performed the work without saying anything. Regarding Saturday, April 28, Hart testified he inspected the slope belt at his 4 p.m. starting time and noted that the pen in one of the splices was broken. He indicated the belt was running at the time, and he claimed that it was his opinion that the belt would have broken if coal was run on it for an hour. When he reported the condition of the belt to Vandiver, Vandiver asked him what he thought the belt had gotten caught on.[7]

[7] Vandiver testified the belt was not in operation when the defective splice was discovered. I credit Hart's claim that it was in operation, and conclude, in the absence of evidence to the contrary, that it had been in operation form 3 p.m. (Massey's quitting time) to 4 p.m.

He told Vandiver he did not think it had gotten caught on anything.

Vandiver claimed during his testimony that he exhibited his disappointment with Massey on Monday, April 30. He initially testified that when he encountered Massey in the vicinity of a trash barrel into which the defective belt splice had been placed the preceding Saturday, he asked the employee why he had told him a story on Saturday, and directed his attention to the defective splice which was in the barrel. He added that he told the employee he was including him in the layoff while he should fire him. He claims Massey merely looked in the barrel, shrugged his shoulders, and walked off without saying anything. Vandiver thereafter indicated he recalled that Adams rather than himself had informed Massey he was included in the layoff.

Massey denied Vandiver's version of their encounter at the trash barrel. He testified that Vandiver merely pointed to the barrel and told him to look in it. He claims he looked, saw a discarded splice, and left the area. He testified that there was no further conversation between Vandiver and him; that Vandiver did not ask him why he told a story on Saturday; and that Vandiver did not say anything about firing him. While I do not doubt that Vandiver decided about an hour after his Saturday bathhouse conversation with Massey that he no longer wanted the employee to work for Respondent, his tendency to tailor his testimony to meet the needs of Respondent's defense, and his tendency to give rambling and inconsistent accounts of events which occurred, cause me to conclude Massey's version of the Monday barrel event is the more reliable version.

In sum, the record reveals that Respondent tolerated less than full performance by employee Massey until Vandiver learned on Friday, April 28, that the employee would support the Union if other employees supported it. While Vandiver claimed that the defective belt splice situation, which was discovered about an hour after the bathhouse incident occurred, caused him to conclude Massey did not deserve further employment at Respondent, the apparent fact that the belt was operated for approximately an hour after Massey left the premises suggests the possibility that the defect in a splice occurred during that period. Indeed, Vandiver inquired what the belt may have gotten caught on when employee Hart first informed him a defective splice had been discovered. Noting the instant record reveals Respondent was adamantly opposed to unionization as demonstrated by Vandiver's conduct, the indication by various supervisors that the mine would be closed if it went union, and the treatment accorded Winebarger, who Vandiver felt to be the leader of the unionization attempt, I conclude Respondent has failed to prove that it would have refused John Massey recall when employee Hart resigned to accept recall at Peabody on June 10 or 11, 1990, in the absence of the employees' participation in protected conduct. Accordingly, I find, as alleged, that Respondent violated Section 8(a)(3) and (1) of the Act by refusing Massey recall from layoff.

Michael Wilson

Wilson was hired by Respondent in March 1986. He spent a portion of his employment performing general inside work and was, during the final 6 or 7 months of his employment, a pinner operator. He was laid off several times during his period of employment, but he was retained when a layoff was effectuated in late 1988. He testified he was never disciplined while employed by Respondent.

Wilson testified that in March 1990, he requested a meeting with Lewis Vandiver to ascertain whether he could expect to remain employed by Respondent. He explained he was contemplating the purchase of a home, and he informed Vandiver of that, indicating he was hesitant because he had heard talk about a possible layoff or the possible sale of the mine. He claims Vandiver told him he would have a job as long as he did not quit.

Vandiver acknowledged that Wilson discussed his employment in the future, and his intention to buy a house with him, but he claims he told the employee that conditions of the mine were such that he did not even know if he would have a job in the future. He claims he advised the employee to refrain from incurring any indebtedness. Significantly, the record reveals that Wilson did not buy a new house. Noting that Respondent was experiencing both financial and production problems at the time of the conversation of discussion, I find Vandiver's version to be more believable than Wilson's.

The record reveals that Wilson did not attend any union meetings until April 30, the day he was laid off. He testified, however, that he asked Supervisor Adamson several weeks prior to April 30 if he (Adamson) would sign a union card, and that after Adamson indicated he would, told him that he would sign also. As indicated, above, I credit his version of that conversation, which was substantially corroborated by Adamson. I note, however, that Adamson testified that Lewis Vandiver showed him the Union's April 24 letter after he had received it, and he asked Adamson if he knew anything about the union organization. Adamson testified he told Vandiver he had heard nothing. Noting that Wilson initiated the discussion he had with Adamson, who was originally hired by Respondent in a nonsupervisory capacity, I am not inclined to impute Adamson's knowledge that Wilson had indicated he might sign a union card to the Respondent. Accordingly, I find that General Counsel has failed to establish that Respondent had knowledge of Wilson's prounion sentiments before or after April 30, 1990.

The record reveals that after he learned he was to be laid off on April 30, Wilson took a tape recorder to the mine and attempted to cause Supervisor Campbell to state that the layoff was being effectuated because the employees were seeking union representation. During the incident, Campbell acknowledged he had predicted the mine would be closed if employees selected the Union as their representative, but he denied the layoff was caused by the union organization attempt.

While the transcription of the taped remarks of Adams' meeting with second-shift employees on April 30 reveals that Wilson and others were informed they were being temporarily laid off, Lewis Vandiver testified that items had been stolen at the mine during Wilson's period of employment and that caused him to cause Adams to ascertain whether Wilson had a criminal record a month or so after the layoff. Adams conducted an investigation and learned that Wilson had been convicted of receiving stolen property in 1986. The employee was sentenced to 1 year in the state penitentiary for the offense.

Vandiver testified he decided after receiving Adams' report on Wilson, that he did not want the employee recalled.

In addition, he indicated he harbored ill feelings toward the employee because he used vulgar language, and he held him responsible for destroying the bucket on a scoop while removing it from the mine 5 or 6 months prior to the April 30 layoff. Wilson credibly testified that the scoop bucket was damaged before he and another employee sought to remove it from the mine for repair, and he indicated that the bucket was damaged beyond repair through no fault of his or the other employee. He further testified that neither he nor the other employee were disciplined as a result of the situation.

In sum, the record fails to reveal that employee Wilson engaged in union activity prior to the time he was laid off on April 30. As indicated, the circumstances surrounding his statement to Adamson that he would sign a union card are such that I conclude Adamson's knowledge of the employee's sentiments should not be imputed to Respondent. Moreover, while General Counsel contends Vandiver announced on August 23, 1990, that he did not intend to recall six employees from layoff because he suspected they had engaged in union activities, I note that Lewis Vandiver Jr. and former part owner of Respondent G. D. Franklin were in the group of six. Vandiver testified he did not know why he made the statement to the Board agent; that it was not accurate as he intended to reemploy his son. After careful consideration of the entire record, I am constrained too find that General Counsel has failed to establish, prima facie, that Wilson was refused recall from layoff for discriminatory reasons.

Donald Raynor

Raynor was employed by Respondent in October 1987. He was utilized during the tenure of his employment as an inside man. He was laid off in December 1988, but was recalled in January 1989, and remained employed until he was laid off on April 30, 1990.

Raynor testified he attended union meetings at the Union's offices on April 9 and April 23. He signed an authorization card at the April 9 meeting. He testified he never discussed the Union with anyone at the mine. Like other employees laid off on April 30, he was informed the layoff was temporary, and he would be recalled if things picked up.

The employee acknowledged that he was contacted on November 20 and was asked if he desired to be interviewed for possible recall at Respondent. He testified he phoned Attorney Adams the following day to inform him he was not interested in returning to work at Respondent.

General Counsel contends Vandiver's August 23 indication that Respondent did not intend to recall the six employees who remained in layoff at that time warrants an inference that Raynor was refused recall because he was suspected of being a union adherent. As indicated above, Louis Vandiver Jr. and G. D. Franklin were also in the group of six. In the absence of evidence which would show that Respondent was aware of the fact that Raynor attended union meetings and signed a union authorization card, I find General Counsel has failed to prove, prima facie, that Raynor was refused recall for discriminatory reasons.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully interrogating employees concerning their union activities and sentiments, creating the impression that the union activities of its employees were under surveillance, and threatening to close its mine if employees obtained union representation, Respondent has violated Section 8(a)(1) of the Act.

4. By refusing to recall employees Paul Tim Winebarger and John Massey from layoff because they joined or supported the Union, Respondent violated Section 8(a)(3) and (1) of the Act.[8]

5. Respondent has not violated the Act except as expressly indicated in this decision.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent decided on or about August 23, 1990, to refuse recall from layoff to employees Paul Tim Winebarger and John Massey, I recommend that Respondent be ordered to offer said employees immediate and full reinstatement to their former positions of employment, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings suffered by reason of the unlawful discrimination against them, less interim earnings, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[8] In view of my finding that Respondent violated Sec. 8(a)(3) after entering the above-described settlement agreement, I find the Regional Director properly revoked it.